

Furthermore, feedback from Children Now's focus groups suggests that children indeed will be drawn to interactive features in educational and informational programming, not only leading them to more substantive information, but also exposing them increasingly to interactive technology itself. Furthermore, focus group feedback suggests that interactivity also will draw children to core programming in the first place.³⁹

Finally, it is important to point out that the proportional interactivity rule is well justified by broadcasters' obligations to serve the public interest,⁴⁰ and that it, like the proportional rule for core programming, provides flexibility to broadcasters while ensuring basic protections for children. With regard to the former, among the extraordinary benefits provided broadcasters in their receipt of digital spectrum is the ability to utilize interactive and similar technologies for commercial purposes. It is entirely in keeping with the policies underlying broadcasters' public interest obligations that, in exchange for their receipt and use of so valuable and public a

Children Now proposes requiring broadcasters to explain in their reports to the Commission that the bulk of any interactive components used to fulfill their proportional interactivity requirement are in a format accessible at basic levels of digital service. This does not stop broadcasters, of course, from including more deluxe features as well as those available to all digital viewers, but nonetheless assures a basic level of access to the latter. In short, it helps to ensure that children from families of more moderate means will not be left behind in the digital revolution.

Of course, this analysis assumes that all persons with television sets will be able to access digital television by the time that the proposals suggested here are implemented fully. To the extent that a digital divide still exists by such time as between those who can access digital television at *any* level, versus those who still can afford only to access analog television, the Commission should take steps to ensure that children in households with only analog access have not *lost* any of the protections currently in existence. In such circumstances, for example, the Commission might consider mandating that three hours of each broadcaster's core programming be broadcast in a format receivable by families with access only to analog television.

³⁹ As relayed in Appendix D at 9, most children in the 7–11 year old group stated that they would be more likely to watch core programming with interactive educational links, whereas most children in the 12–15 year old group and in the 15–18 year old group indicated that they don't know whether interactive educational links would have that effect upon them, or that they would not have that effect. As indicated throughout narrative discussions of the focus groups, however, *see* Appendix D at 5, 7–10, the latter responses were inconsistent with the enthusiasm that those focus group respondents demonstrated with regard to interactive educational links, and thus likely indicated ambivalence regarding educational interactivity as an abstract concept, rather than a genuine lack of interest or enthusiasm in educational interactivity.

⁴⁰ *See infra* notes 14–16 and accompanying text.

resource, broadcasters must utilize some of that resource in a manner conducive to the public interest, and particularly to the interests of children. Furthermore, insofar as the 3% proportional broadcasting rule in itself requires so small a percentage of core programming, the proportional interactivity rule, requiring that a subset of that already small amount be interactive, is inherently limited and hence entirely reasonable toward broadcasters. And, as with the proportional broadcasting rule, the proportional interactivity rule merely sets a baseline quantity for interactive core programming, while leaving broadcasters very free to develop innovative educational and informational tools consistent with their own visions and programming desires. Finally, while a proportional interactivity rule sets a minimum level of protection for children in the case that market forces prove insufficient, such a rule is likely to serve broadcasters' interests as well as those of children,⁴¹ and perhaps even catalyze the process of realization of a nexus between the interests of the two, as increasingly "tech-savvy" children prove reluctant to watch non-interactive programming.⁴²

⁴¹ Of course, while Children Now believes that interactivity has great potential to elevate children's access to information and to involve them in the learning process, we also recognize that interactive educational television remains largely uncharted territory, and that theories as to its benefits must ultimately be borne out in practice. Therefore, in conjunction with our general recommendation that the Commission revisit issues regarding digital technology as the digital era unfolds, *see infra* Section IV, Children Now specifically urges the Commission to explore both the manifestations and educational value of such programming in the context of such inquiries. Among the relevant topics to explore, for example, would be both the content of interactive programming and the effects of the technology itself upon children's intellectual development.

⁴² Berry interview (suggesting that interactivity may eventually become a commercial necessity for broadcasters); Roberts interview (same); telephone Interview with Dr. Amy Jordan, Annenberg Public Policy Center, University of Pennsylvania (Nov. 6, 2000) [hereinafter Jordan interview] (noting that interactive features present "some economic potential for broadcasters"); Jaffe interview (noting that potential digital improvements in educational programming should be economically beneficial for broadcasters); Kleeman interview (noting that "smart producers will look at ways to create educational applications of gaming" and other features "designed to get kids actively engaged in the process").

2. Incentives for Educational Interactivity in Core and Non-Core Programming; Increased Access by Parents to Programming Information

Children Now also proposes a few simple measures designed to empower parents through increased access to programming information, and to make both the offering of quality core programming and the use of educational interactivity in *non-core* programming, more commercially beneficial to broadcasters. Specifically, Children Now proposes: (1) Requiring broadcasters to include a simple and unobtrusive link in the corner of the television screen during core programming, which parents can engage to access programming information; and (2) Labeling all programming containing interactive educational features with a special label to encourage parents to steer children toward the program, and indeed to encourage children directly to view the program, thus benefiting broadcasters as well as parents and children.

a. Link to Programming Information

Children Now's proposal to empower parents through increased program information relates directly to the Commission's request for general commentary on "whether the advanced capabilities of digital broadcasting can be used . . . to help implement the CTA."⁴³ Specifically, the Commission, citing Children Now's *NOI comments*, opined that:

One approach would be to require broadcasters to use datacasting to make available during a core program information explaining why the program is considered to qualify as "core." Another option would be to require broadcasters to provide additional content ratings information on core programs from independent sources,

⁴³ *NPRM* at ¶ 24.

such as public interest groups that rate children's educational programming.⁴⁴

Indeed, Children Now's subsequent consultations with experts significantly bolster the point that such measures are necessary to make children's programming requirements effective.⁴⁵ Several experts observed that currently, parents lack meaningful access to information regarding the existence of a core programming requirement, let alone what is meant by "core" or "E/I" programming, and what programs are "core" and why.⁴⁶ In particular, experts commented on the ineffectiveness of the existing requirement that the label "E/I" appear only for a very short period at the beginning of a core program,⁴⁷ and on the fact that there exist "watchdog" groups which discuss and rate core programming, but that parents are unaware of how to access this information.⁴⁸ Finally, experts noted that increased parental access to programming information not only would benefit parents and children, but would reward those broadcasters who air high quality core programming.⁴⁹

Therefore, Children Now proposes that broadcasters be required to maintain an "E/I" label on the screen throughout a core program, and, more importantly, to maintain an onscreen link throughout programming to program content information. Such

⁴⁴ *Id.* (footnotes omitted).

⁴⁵ Additionally, Professor Brian Smith of MIT's Media Lab indicated that measures should not present technical feasibility problems. Smith interview.

⁴⁶ Jordan interview (noting that parents generally are not familiar with core programming schedules, and further that "[n]o one knows that 'E / I' means 'Educational / Informational' or what the little icons mean at the beginning of the shows"); Dorr interview. *See also* Amy Jordan, Annenberg Public Policy Center of the University of Pennsylvania, *Is the Three Hour Rule Living up to its Potential?*, 3, 4, 23-24, 28 (2000) [hereinafter *Three Hour Rule*].

⁴⁷ Jordan interview; Calvert interview; Dorr interview. *See also Three Hour Rule*, *supra* note 46, at 3, 4, 23-24, 28. *Cf.* Gerbner interview (pointing out that programming information for parents must be freely and regularly available in order to make the provision of such information meaningful and effective).

⁴⁸ Jaffe interview; Heintz-Knowles interview.

⁴⁹ Heintz-Knowles interview; Roberts interview (deeming such informational features an "incredible marketing device"); Calvert interview (noting that educating parents as to "quality media environments"

information should include, at minimum, the fact that the program is considered “core,” an explanation of what core programming is, the age range toward which the program is geared, and a synopsis of the explanation provided by the broadcaster to the Commission as to how the program is educational and informational.⁵⁰ Children Now also strongly recommends that the Commission require broadcasters to include on the same linked site the Internet addresses of major “watchdog” groups that discuss and rate core programming.⁵¹

Such a requirement is extremely unobtrusive, while potentially of tremendous help for parents who seek to make smart programming choices for and with their children. The E/I programming logo as well as the informational link can sit quite unobtrusively in a corner of the screen in the same way as do network identification logos currently utilized by many stations. Indeed, the two ideally can be incorporated into one small but easily recognizable symbol, as demonstrated in Appendix B, which offers a sample of a potential E/I logo / informational link.

Adoption of these proposed requirements would strike an ideal balance between flexibility and responsibility for broadcasters, encouraging better programming not through content restraints or requirements, but by empowering parents to make informed choices. And as the comments of the experts with whom Children Now has spoken suggests, such parental empowerment is crucial for core programming requirements truly to be effective.

can help make those “environments” profitable); Turow interview (noting importance generally of providing parents with programming information).

⁵⁰ The link should be in a format accessible to all digital television viewers, as opposed to requiring higher-end digital features. *Cf. infra* note 38.

b. Incentives for Educational Interactivity in Core and Non-Core Programming

Combining the goal of empowering parents with information, the desire to give broadcasters incentives to program educational and informational interactivity, and the desire to foster educational programming both in and out of the core context, Children Now proposes the use of an additional symbol to denote programming with educational *interactive* features. Such identification would be mandatory for that educational interactivity used to fulfill broadcasters' proportional interactivity requirement for core programming, given the importance of parental knowledge to effectuate fully the core programming requirement. Such a symbol potentially could be combined with the E/I / informational symbol discussed above, and, like that symbol, could appear unobtrusively in the corner of the viewing screen. Possible symbol designs are included in Appendix B.

Children Now also proposes giving broadcasters who include educational interactive features in the non-core context the option to utilize an educational interactivity symbol.⁵² To use the symbol, broadcasters would have to explain to the Commission the educational and informational nature of the interactive features, using the same standards applied to determine the educational and informational nature of core programming. The purpose of creating a symbol to denote educational interactivity in the non-core programming context would be to reward broadcasters who create such programming, enabling them easily to flag for parents, children, and educators the existence of educational interactive content.⁵³ Furthermore, the use of such a symbol to

⁵¹ CME similarly proposed in its NOI comments that "a broadcaster might provide links to Web sites or other sources that provide more detailed descriptions of the programming." *CME's NOI Comments* at 14.

⁵² See Appendix B for potential symbol designs which would differentiate core programming with interactive educational components from non-core programming with interactive educational components.

⁵³ Indeed, broadcasters already evince a recognition of the market benefits of including interactive features in programming, suggesting that any such requirement may help jumpstart a process ultimately benefiting

denote voluntary use of innovative educational content could provide valuable public relations benefits to broadcasters, in much the same way that public service announcements currently do.

The possibilities for incorporating educational interactive content into otherwise non-core programming are virtually limitless. Broadcasters may wish, for example, to include links to critical-thinking questions regarding situations in which given television characters find themselves, or links to further information regarding a social, political, historical, scientific or other educational subject related to a given program or storyline. Another possibility might be to include links geared directly toward educators, suggesting ways that issues raised in a program might be incorporated into a lesson plan.⁵⁴ Similarly, “program guides” could be created for parents, suggesting ways in which programs may be utilized as fodder for discussion with children, or even for educational games.⁵⁵ With respect to the latter, game shows might provide one obvious springboard for innovation, with interactive versions of game shows featuring questions in particular educational categories and for particular age groups.⁵⁶

broadcasters as well as children. *Broadcast & Cable Online* reports, for example, that “CBS is expanding its relationship with WebTV into primetime, with plans to add interactive elements to at least one drama and one comedy this season.” Notably, the report suggests that such interactivity could be particularly useful to boost such family-friendly programs “in need of buzz” as *Judging Amy* and *Touched By An Angel*. See “CBS Eyes WebTV Primetime Plays,” <wysiwyg://1173/http://www.broadcastingcable.com> (last visited November 30, 2000); Jaffe interview (noting that “the marketplace is really encouraging [interactivity]”); Smith interview (noting that broadcasters already are experimenting with interactive television).

⁵⁴ For example, parallels drawn between plots of sitcoms popular among high school and junior high school-aged children and works of literature might provide interesting fodder for English classes.

⁵⁵ Professor Smith pointed out the potential importance of guides to facilitate educational interactions between parents and children, particularly in light of the limited quantity of time that parents typically have to spend with their children. Smith interview. Ellen Wartella similarly raised the possibility of interactive features to assist parents in raising educational points about programming with their children. Wartella interview.

⁵⁶ ABC’s very popular “Who Wants to be a Millionaire”, for example, might wish to feature interactive links to separate history, science, literature or other versions of its game, and might further wish to subdivide those versions by appropriateness for given age groups. This would simply be an extension of what “Who Wants to be a Millionaire” already does on the Internet, as the show’s website currently

Children Now's proposal regarding educational interactivity in non-core programming relates primarily to the Commission's question regarding how to interpret the CTA's requirement that broadcasters serve "the educational and informational needs of children 'through the licensees *overall* programming, including programming specifically designed to serve such needs.'"⁵⁷ Specifically, the Commission asked how that statutory language should be interpreted "in terms of broadcasters' requirement to provide educational programming."⁵⁸ The plain language of the provision makes clear that the Commission *must* consider programming specifically geared toward children's educational and informational needs, insofar as such programming is deemed to be "include[d]" in the overall programming to be evaluated. At the same time, the fact that the terms "overall" and "include[d]" are utilized, suggests that Congress expected the Commission also to consider educational and informational aspects of non-core programming.⁵⁹ Left within the Commission's discretion is how to evaluate the adequacy of the core programming that it is explicitly charged to consider, and how also to consider other aspects of "overall programming."

In this regard, Children Now fully supports the Commission's earlier determination that a minimum programming requirement is necessary to realize Congressional intent that core programming exist at adequate levels.⁶⁰ Children Now

features online questions for general audiences. See http://www.abc.go.com/primetime/millionaire/millionaire_home.html (last visited December 1, 2000). Other game shows currently developing interactive components include "To Tell the Truth" and "Family Feud." See "Interactive Games Afoot," http://www.broadcastingcable.com/daily/daily_article.asp?category=21&articleID=692249169 (last visited December 1, 2000).

⁵⁷ *NPRM* at ¶ 15.

⁵⁸ *Id.*

⁵⁹ See, e.g., *Association of Recycling Industries, Inc. v. ICC*, 660 F.2d 795, 799 (D.C. Cir. 1981) ("effect must be given, if possible, to every word, clause and sentence of a statute ... so that no part will be inoperative or superfluous, void or insignificant") (citations and internal quotation marks omitted).

⁶⁰ See *infra* note 26.

further considers it crucial, as detailed earlier, that such a minimum requirement not be “traded off” against other benefits, including overall programming features.⁶¹ Thus, Children Now considers the best means of heeding the CTA’s “overall programming” language in the context of the instant rulemaking to be the use of incentives to encourage educational features in non-core as well as core programming. In this spirit, Children Now proposes the use of an educational interactivity symbol for non-core programming. Additionally, Children Now encourages the Commission to embrace other positive suggestions as to potential incentives for broadcasters to make non-core programming more beneficial for children, without compromising the important minimum protections of a 3% core programming rule.

D. “Pay or Play”: A Model for Future Consideration

The Commission requested comments on the merits of a “pay or play” system, whereby a broadcaster may meet some or all of their 3% core programming obligation by paying to have another broadcaster air the relevant amount of core programming instead.⁶² In making this request, the Commission noted that Children Now had raised the issue as a subject for further inquiry in our *NOI comments*.⁶³ In those comments, Children Now raised such potential benefits of “pay or play” as its ability to grant broadcasters increased flexibility in meeting their core programming requirement, as well

⁶¹ See *infra* notes 23-26 and accompanying text. This position is entirely consistent both with Congress’ permissive language in § 303(b) of the CTA, as noted in footnote 26, as it is with Congress’ “overall programming” language. The latter, again, left it entirely within the Commission’s discretion as to how and to what extent to consider the various types of educational programming content.

⁶² *NPRM* at ¶ 20.

⁶³ See *id.* As noted earlier, CME also suggested as part of its “menu” proposal that broadcasters be given the option of helping to fund core programming by non-commercial, educational organizations. *CME’s NOI Comments* at 5.

as such potential drawbacks as the difficulty of quantifying an adequate dollar figure for the production of quality core programming.⁶⁴

After conducting extensive interviews with experts on the subject, Children Now concludes that now is not the optimal time for a rulemaking on “pay or play.” Consideration of “pay or play” necessarily raises intricate questions concerning the structure of the broadcasting market, market incentives, and the relative positions of the market’s players, and Children Now believes that the optimal time for a renewed “pay or play” inquiry would be within a year or two after the digital era has more fully unfolded, and the realities of its marketplace therefore are better known. Furthermore, Children Now deems it of primary importance that the Commission utilize the instant rulemaking to establish a basic regulatory framework of unambiguous minimum programming requirements and supplementary measures, such as the proportional core programming and interactivity rules, as well as the preemption standards and promotional and informational requirements proposed herein. While it is important that these rules and standards be flexible enough to accommodate future innovations and changes, including the possible incorporation of a “pay or play” model, the instant rulemaking should focus solely upon establishing these fundamental rules and standards. Pay or play then could be considered as a supplemental measure in a future inquiry, after such rules and standards take hold, and after the digital television market is understood more fully.

Having said that, however, Children Now notes that it indeed has considered in depth potential models for a “pay or play” system, should such a system be implemented. Thus, we present in Appendix A a series of tentative ideas regarding the costs and benefits of various “pay or play” models, including a model which we believe merits

⁶⁴ See *supra* note 62. See also *NOI comments* at 36-38.

particular consideration. Children Now believes that the latter model, which is a system of “pay or play” by private contract, has the potential to facilitate rich and innovative core programming, depending upon the realities of the digital broadcasting market. Thus, we urge the Commission consider it as a focal point for future inquiry, once those market realities are more apparent.

E. Promoting Core Programming: Making the Core Programming Obligation More Effective

The Commission requested comment on whether it should require promotion of core programs, and also whether it should require stations to air public service announcements about the value of educational programming and the meaning of the E / I icon.⁶⁵ On a related note, the Commission invited comment on whether it should revise the definition of “commercial matter” to include some or all program interruptions not currently included in the definition, such as public service announcements and promotions of a broadcaster’s own upcoming programming.⁶⁶

While Children Now does not propose a change in the definition of “commercial matter,”⁶⁷ it does propose that a reasonably proportional share of promotional time be dedicated either to promoting core programming or to airing public service announcements regarding the value of educational programming and the meaning of the E / I icon generally. Specifically, Children Now proposes that 3% of all time that a broadcaster spends airing promotions for its own programming be filled either with promotions for core programming, or with public service announcements regarding the

⁶⁵ *NPRM* at ¶ 38.

⁶⁶ *Id.* at ¶ 34.

value of the educational programming and the meaning of the E/I icon generally. This small percentage requirement is entirely fair and reasonable, being not only quite small but also being tailored precisely to fit the amount of core programming required of each broadcaster, while also being flexible in allowing broadcasters to fill the required time with public service announcements as well as or instead of core programming promotions.⁶⁸

The justification for this small percentage requirement is two-fold, stemming both from broadcasters' public interest obligations, as well as from the need for greater dissemination of information to children and parents to effectuate these obligations. With regard to the former, as noted earlier, it is well recognized that broadcasters owe a service to the public, and particularly to vulnerable young viewers, in exchange for their receipt and use of valuable spectrum, and that this obligation certainly extends into the realm of more valuable digital spectrum.⁶⁹ Just as the Commission found in 1996 that minimum programming requirements are necessary to effectuate this obligation and thus exercised its discretion under the CTA to impose such requirements, so Children Now strongly urges the Commission to impose the reasonable proportional promotions rule suggested here so as to help effectuate those minimum programming requirements. Indeed, many of the experts with whom we spoke echoed the need for more information to reach parents with respect both to the E / I programming requirement generally, as well as the

⁶⁷ Children Now would not, however, necessarily oppose proposals by other commenters to alter the definition.

⁶⁸ Such flexibility also makes the requirement easily transportable into any future framework in which a "pay or play" system might be adopted. Presumably, "paying" broadcasters within such a system would choose to dedicate some or all of their promotional time to public service announcements regarding educational and informational programming generally, rather than to promotions for specific programs.

⁶⁹ See *infra* notes 14-16 and accompanying text.

nature and scheduling of specific core programs.⁷⁰ Furthermore, children in our focus groups indicated that they would be more likely to watch a core program if they saw a promotion for such a program while watching a non-core program.⁷¹ Thus, dissemination of promotional and public service information regarding core programming helps to effectuate the core programming requirement,⁷² and therefore is significant to the effective fulfillment of a broadcaster's public service obligations.⁷³

F. Preemption of Core Programming in the Digital Age: Taking Advantage of Enhanced Digital Capacity

The Commission also requested comments on how rules regarding the preemption of core programming might be altered in light of the enhanced programming capacity of digital television.⁷⁴ The Commission noted the Mass Media Bureau's determination that the average core programming preemption rate for stations affiliated with the largest networks is nearly 10%, and has been as high as 25% in a quarter with numerous sports programming commitments.⁷⁵ Given these statistics, the Commission indicated that its

⁷⁰ See *infra* note 46 (citing expert commentary and other authority for proposition that parents currently have insufficient access to core programming information). See also Heintz-Knowles interview (discussing great importance of promoting core programming to facilitate awareness by parents and children).

⁷¹ See Appendix D at 6.

⁷² Children Now proposes that the required promotions or public service announcements be aired between the hours of 7 a.m. and 10 a.m. While this does not require broadcasters necessarily to air the announcements outside of core programming, it gives them the flexibility to do so, encouraging a dispersal of such announcements and promotions throughout a variety of programming targeted toward children.

⁷³ In addition to relating directly to the Commission's request for comments on the promotion of core programming, the instant proposal also relates to the CTA's language requiring broadcasters to serve the educational and informational needs of children "through [their] overall programming . . .," see *supra* notes 57-59 and accompanying text, by requiring broadcasters to promote their own core programming, and / or educational and informational programming generally, throughout their programming schedule.

⁷⁴ *NPRM* at ¶ 28.

⁷⁵ *Id.*; Jordan interview (noting that preemption currently is "a huge loophole in the three-hour rule, [which is] really being taken advantage of"); Jaffe interview (noting that preemption has "been a real scapegoat for the industry and a real problem").

preemption inquiry was intended to determine whether a new policy should be adopted “to ensure that [the] preemption policy does not thwart the goals of the CTA.”⁷⁶

Children Now fully agrees that existing preemption rates are antithetical to the goal of regularly available educational and informational programming; as noted earlier, a minimum programming requirement is effective only to the extent that it is adhered to consistently. This applies equally to the notion that core programming must be available as scheduled and hence as anticipated by viewers, as it does to the notion that minimum core programming requirements must not become overwhelmed by exceptions. Fortunately, the advent of digital television holds great promise for addressing the matter of preemption with relative ease.

Quite simply, the “multicasting” ability which digital television provides broadcasters, enabling them to air multiple stations at the same time,⁷⁷ leaves virtually no excuse for failing to adhere to a core programming schedule.⁷⁸ Therefore, Children Now proposes that, in the digital age, broadcasters simply be required to air any potentially “preempting” material on a channel other than one featuring core programming. Alternatively, if the Commission wishes to provide broadcasters with somewhat more flexibility, then Children Now proposes that broadcasters be required at least to shift the core programming to another channel of equivalent quality, airing it at the same time as it was scheduled to be aired on the original channel, and providing datacasting throughout

⁷⁶ *NPRM* at ¶ 28.

⁷⁷ See *infra* note 3 and accompanying text.

⁷⁸ Experts seconded this notion. Jordan interview (agreeing that there’s no excuse for preemption of core programming in digital age); Kleeman interview (noting that “if you’re talking about multiple channels, then you can feed your children’s program on another channel” rather than preempt it); Calvert interview (suggesting that rules should be “firmer” with increased channel availability); Heintz-Knowles interview.

the entire preempting program, informing viewers as to the channel on which the preempted program is airing.⁷⁹

Children Now would propose one exemption to the aforementioned rule, for the case of “breaking news.” “Breaking news” would be strictly defined, however, as news regarding matters of such public importance as to justify its immediate broadcast on every channel in order to inform the entire viewing public. By definition, then, information broadcast only on a core programming channel, but not aired on a broadcaster’s other channels, would not be “breaking news.”

Children Now believes that the adoption of this proposal is an important component in ensuring that any minimum programming rule indeed is genuinely a *minimum* rule, and thus in effectuating the core programming requirement.

III. Advertising in the Digital Age: Protecting Children While Embracing Progress

Children Now’s proposals regarding advertising in the digital age spring from a philosophy closely related to that underlying our approach to educational and informational programming in the digital age. That is, we seek to strike a balance between protecting children from the excesses of commercialism, particularly insofar as such excesses can dilute many of the educational benefits of digital technology, while at the same time acknowledging the reality that economic incentives drive the commercial broadcasting market, and that too heavily squelching economic incentives to produce core programming or to utilize new technologies may ultimately impede children’s

⁷⁹ Jaffe interview (noting importance of publicizing preemption information so that viewers can locate preempted programming); Calvert interview (noting importance of children being able to locate preempted programs); Heintz-Knowles interview (agreeing with utility of such notification).

interests. With this in mind, our proposals fall into three main categories: (1) Reviewing the public interest policies underlying advertising restrictions, we conclude, in agreement with the Center for Media Education's (CME's) proposal in its NOI Comments,⁸⁰ that existing advertising restrictions, as well as any new restrictions formulated in light of digital advances, should apply equally to free and pay programming; (2) Weighing the importance of encouraging interactivity against the danger of inundating children with unrestricted commercialism, we propose a model for reasonable restrictions upon the use of commercial links during children's programming; (3) Finally, we support CME's proposal that existing restrictions on Internet advertising relating to children's privacy should be imported into the digital interactivity context.⁸¹

A. Applicability of Advertising Restrictions to All Channels⁸²

As suggested by CME in its NOI comments, the policies underlying the use of advertising restrictions for children's programming apply regardless of the free or pay status of the channel upon which such programs are broadcast or to which interactive programming is linked, and such restrictions therefore should apply equally to free and pay broadcasts and related interactive services.⁸³ The policies underlying such restrictions are imbued in part with the general notion that broadcasters must utilize their

⁸⁰ See CME's NOI Comments at 10.

⁸¹ See CME's NOI Comments at 13-14.

⁸² This subsection addresses the Commission's inquiry as to "whether children's advertising limits and policies should apply only to free over-the-air channels, or to all digital channels both free and pay[.]" *NPRM* at ¶ 30. See also *id.* at ¶ 31.

⁸³ Children Now also agrees with CME's suggestion that all existing restrictions on advertising, such as host selling, should be imported into the digital era. This proposal is very straightforward with respect to video programming. With respect to interactive programming, Children Now proposes that all directly applicable restrictions such as host selling apply both in the video and interactive realms, whereas restrictions less easily transportable to the interactive realm should apply in some analogous form. For example, Children Now proposes in Section III(B) a series of requirements analogous both to temporal

valuable spectrum with an eye toward the public interest,⁸⁴ but they rest primarily upon a recognition of the unique vulnerability of youth to commercial messages.

As Congress noted in both the Senate and House reports underlying the CTA, scientific evidence long has confirmed the unique vulnerability of children to television advertising.⁸⁵ As noted in the House Report:

It is well established by scientific evidence that children are uniquely susceptible to the persuasive messages contained in television advertising. Two important limitations on a youngster's ability to comprehend the nature and purpose of television advertising account for this unique vulnerability to commercial persuasion. First, research findings indicate that a substantial proportion of young children, typically a majority of those up to the age of 4 or 5, lack the perceptual capabilities to consistently discriminate program from commercial content. Second, research demonstrates that an even larger proportion of young children, typically a majority of those under the age of 7 or 8, lack the ability to recognize the persuasive intent that necessary underlies all television advertising.⁸⁶

In short, "[y]oung children are neither wary nor skeptical of commercial claims and appeals and therefore tend to place indiscriminate trust in television advertising."⁸⁷ The Commission, of course had reached essentially the same conclusion in 1974.⁸⁸

The policies underlying advertising restrictions during children's television programming thus are based primarily upon the unique vulnerability of children as viewers.⁸⁹ The age or vulnerability of the child viewer remains constant, of course, regardless of the channel that a child viewer watches. Therefore, any advertising

limitations and to separations between programming and commercials that should be imposed with respect to interactive commercial programming.

⁸⁴ See *supra* notes 14-16 and accompanying text.

⁸⁵ Senate Report at 9-10; House Report at 6.

⁸⁶ House Report at 6.

⁸⁷ *Id.*

⁸⁸ *Children's Television Report and Policy Statement*, 50 F.C.C.2d, ¶ 34 (1974). See also *Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987).

restrictions for children's programming⁹⁰ should apply to such programming on or linked to all channels, regardless of the free or pay status of the channel.⁹¹

B. Commercialization of Interactive Links: Drawing the Necessary Lines

The Commission posed a series of questions relating to the extent to which the use of commercial interactive links during children's programming should be restricted.⁹² Children Now views it as especially crucial to strike a careful balance with regard to this issue, given the importance both of encouraging interactive programming, and of ensuring that the educational value of such programming is not overwhelmed in a sea of advertising. With this in mind, Children Now proposes that the use of links to commercially sponsored sites, including sites packaged with and linked to a program as well as independent websites, be conditioned upon a clear separation between program content and advertising content or non-program website content generally, in the manner described below.

⁸⁹ Several of the experts with whom we spoke also made a point of mentioning the special vulnerability of children to commercial messages. Calvert interview; first Kunkel interview; Berry interview; Dorr interview; Roberts interview.

⁹⁰ In addition to the advertising restrictions that Children Now proposes below for the interactive programming context, Children Now agrees that existing advertising restrictions should continue to apply in the context of video programming in the digital world, and, as expressed in the instant section, should apply to free and pay programming alike. *See NPRM* at ¶ 31.

⁹¹ Furthermore, to the extent that the general public interest standard also factors into the policy rationale underlying advertising restrictions, such standard itself applies regardless of the free or pay status of the channel at issue. As discussed *supra* note 9, any pay digital broadcasting in which a broadcaster chooses to engage is facilitated by receipt of the same block of spectrum in which the broadcaster also broadcasts free programming. That a broadcaster makes the determination that its financial interests are best served by providing some pay programming in no way diminishes its general public interest obligation with respect to the spectrum utilized for that purpose.

⁹² *NPRM* at ¶ 32. These questions were based upon CME's proposal that "all direct links to commercial websites during children's programming" be prohibited. *Id.*; *CME's NOI Comments* at 10-12. While Children Now shares CME's concern regarding the potential for increased manipulation and invasiveness on the part of advertisers in the digital era, Children Now considers it important to strike a balance between properly restricting interactive advertising and giving broadcasters an incentive to create interactive educational sites. Thus, Children Now offers the proposal outlined in the instant section.

First, for interactive sites packaged with and linked to a program via digital technology – in other words, sites packaged by the program producer in conjunction with the video program -- Children Now proposes first, that any advertising be accessible not from the television screen directly, but from a link *within* the packaged site, and second, that that link serve as a “doorway” to the advertising segment of the site, thus creating a clear separation between program content and advertising. With respect to the former, while the overall site itself may be accessed by engaging a link from the television screen, advertising can be accessed only by engaging a link *within* the site. With respect to the latter, the idea would be that child viewers could not select specific “click-on” ads directly from the substantive program content portion of the site, and thus could not alternate, for example, between clicking on educational links and clicking on toy advertisements from the same virtual page. Rather, on a substantive program content page, the child viewer would be able to see only substantive program content, as well as one link serving as a virtual doorway to the site’s advertising component. It is within that separate advertising component that the broadcaster would be allowed to feature “click-on” and other advertisements. Furthermore, as an additional acknowledgment of the economic interests of broadcasters, the link to that component could be surrounded by small logos alerting viewers as to the advertisers awaiting them in the site’s advertising section, so long as the entire link / logos combination takes up no more than a small corner of the screen, comparable to the unobtrusiveness of the E/I and informational symbols discussed above.⁹³ Finally, upon pressing the link, or “doorway” to the site’s advertising component, the viewer should receive notification that they are entering an

⁹³ Any logos accompanying the link to the advertising site could not themselves be links, as the only link allowed would be the single link to the overall advertising site. The logos, then, would simply be pictures,

advertising site, and should then be given the option to “click” again, indicating their assent to enter that advertising site. A model of such a link / doorway, including surrounding logos, is featured in Appendices B and C.

While the above addresses those interactive components created as part of a program interactivity package and transmitted directly to digital viewers as interactive programming data, broadcasters also will have the technical capacity to create links to independent, Internet based websites.⁹⁴ The latter presents somewhat greater complications, given the difficulty of controlling website content, or of controlling children’s access to other Internet sites once Internet access has been attained. Therefore, Children Now proposes a two-fold rule with respect to Internet links. First, to the extent that a link to an Internet-based advertisement is featured in such an advertising site as referenced in the preceding subsection, and engaging this link would give viewers general Internet access, a second notification should reach viewers once the link is engaged, explaining that they are entering an independent website and thus being transported to the Internet. If, however, the viewer will remain in a controlled environment in that their only access will be to the specific advertising site corresponding to the engaged link, then such secondary notification is unnecessary. Second, to the extent that a broadcaster or producer features links to independent websites which are not in themselves advertisements but which feature links to advertisements, or where the initial link will transport viewers to the Internet more generally, then such initial links should not be accessible directly from the television screen, but rather should be incorporated into a larger interactive program site. In other words, rather than such

symbols, or words.

⁹⁴ *Supra* notes 3, 38 and accompanying text.

Internet sites being accessible directly from the television screen, a larger site (either an interactive program site as described above, or a site whose sole purpose is to feature website links) should be accessible from the screen, with any Internet links contained within the site. Then, upon engaging an Internet link within this larger site, a viewer should receive notification indicating that they are entering an independent website. The notification should include the fact that advertising might be featured on the website or on other Internet materials encountered.

Children Now's primary insights for this proposal come, appropriately enough, from children themselves. Specifically, from feedback derived from our three focus groups, which indicated that children of all age groups are quite enthused about the possibility of utilizing interactive links and believe that such links can be educational, but that they also have a tendency to get extremely distracted by advertising links.⁹⁵ It appeared, in other words, that the children in our focus groups would have difficulty concentrating on educational or other non-advertising links where those links are offered on the same "page" as advertising links, without any significant separation between the two.⁹⁶

Children Now's focus group research, juxtaposed with the well-established proposition that children are more vulnerable to advertising than are adults and in particular have difficulty distinguishing between advertisements and program content,⁹⁷ a

⁹⁵ See Appendix X at 5, 7-10, 12-13. While focus group respondents above the age of 12 fall outside of the category of children to whom advertising restrictions currently are targeted, their responses nonetheless are useful supplements to those of our respondents aged 12 and below, given the former group's closeness in age to those within the regulatory "target group," and given the overlap in ensuring that programming for children 16 and under indeed is educational, and that advertising content does not dilute the educational value of such programming. Cf. note 34 (noting relevance of responses from children above the age of 16 with respect to core programming issues).

⁹⁶ See Appendix X at 5, 7-10, 12-13.

⁹⁷ See *infra* Section III(A).

proposition seconded by many of the experts whom we interviewed,⁹⁸ suggests that advertising not clearly separated from interactive program content not only can unduly manipulate children, but can significantly dilute and overwhelm any educational value of a given program. Children Now's proposal for clearly separating interactive advertising content from interactive non-advertising content, and for separating controlled programming sites from uncontrolled Internet access, is designed to strike a careful balance between the existence of these dangers, and the reality that broadcasters are unlikely to pour significant resources into interactivity without the economic incentive provided by advertising.

While the factual basis of the proposed restrictions thus lies in research on the effects of advertising upon children, their policy basis lies in *existing* advertising restrictions. Indeed, Children Now's proposal, based as it is on a principal of separation and a concern for limiting the degree to which advertising may impinge upon programming, effectively translates existing requirements of temporal advertising limits and of boundaries between programs and advertisements into analogous requirements appropriate to the digital context. Thus, for example, separation between programming and advertisements, which works well in the temporally linear framework of a half-hour video program, becomes, in the non-linear interactive world, notices alerting viewers that they are about to enter an advertising site. Similarly, temporal limitations on advertisements, appropriate in the video context to ensure that advertisements do not overwhelm program content, become, in the interactive world, a requirement that only a small link to an advertising site appear on the same page as interactive program content.

⁹⁸ *Supra* note 89.

Children Now's proposal, in short, is well justified by the factual research on children and advertising, is reasonable to broadcasters insofar as it enables them still to gain advertising revenues with respect to interactive programming, and is preceded insofar as its components are directly analogous to existing advertising restrictions. Children Now thus strongly urges the Commission to adopt the foregoing proposal as striking an appropriate and necessary balance between the interests of children and those of broadcasters in the realm of interactive advertising.

C. Importation of COPPA Requirements Into Digital Interactive Framework

Finally, while the use of digital technology necessitates the translation of certain broadcasting requirements into requirements appropriate for the interactive context, so there exist restrictions appropriate for direct importation into the digital interactivity context. In this regard, Children Now supports CME's proposal that the restrictions of the Children's Online Privacy Protection Act (hereinafter, "COPPA") be imported into the digital interactivity context.⁹⁹

COPPA, of course, constitutes a set of child privacy protections with regard to Internet services. While COPPA is not explicitly limited to advertising practices, its effective focus is upon such practices as would assist marketers and thus would likely occur in the context of or in conjunction with advertising.¹⁰⁰ COPPA's main restrictions include requiring parental consent for the online collection, use or disclosure of personal information from children and prohibiting the conditioning of a child's participation in an

⁹⁹ *CME's NOI Comments* at 13-14. Professor Turow also suggested that COPPA protections should apply to digital interactive links. Turow interview. Similarly, Professor Cowan suggested not allowing links to any websites for which privacy restrictions were not in place. Cowan interview.

online game or similar activity on the child's disclosure of more personal information than is reasonably necessary for such participation.¹⁰¹

Children Now agrees, as an additional response to the Commission's inquiries on the types of limitations to be imposed with respect to commercial links,¹⁰² that COPPA's requirements should be imported into the digital interactivity context. Such requirements would constitute another reasonable and narrowly tailored means of enabling broadcasters to utilize commercial links while at the same time protecting children from abusive or overly invasive advertising practices. Furthermore, such requirements would be even easier to manage in the non-Internet, digital television interactivity context than in the Internet context. Unlike in the Internet context, the non-Internet digital interactivity context is a controlled environment in which transmissions originate from easily identified sources.

Children Now thus urges the Commission to import COPPA's requirements into the digital interactivity context. Such requirements provide another important means of limiting the invasiveness of advertising practices, while at the same time enabling broadcasters to receive advertising revenue as incentive to produce interactive programming.¹⁰³

¹⁰⁰ See, e.g., 15 U.S.C. § 6502.

¹⁰¹ *Id.* at § 6502(b)(1)(A) - (C).

¹⁰² *NPRM* at ¶ 32.

¹⁰³ Children Now additionally notes its support, in both the interactive and non-interactive context, for limiting advertisements only to those appropriate to the age of the viewers to whom the program in which the advertisement appears (or to which the advertisement is linked) are targeted. See *NPRM* at ¶ 36. This

IV. Conclusion

Children Now urges the Commission to adopt the foregoing proposals as a means to facilitate a robust environment for children's educational and informational programming in the digital age. Children Now believes that these proposals strike a critical balance, ensuring basic protections and services for children while leaving broadcasters room for innovation and experimentation.

Yet at the same time as Children Now deems it crucial neither to discourage broadcaster innovation nor to compromise protections for children at the dawn of the digital age, Children Now also recognizes that the full story of the digital age has yet to be written. Thus, while a regulatory framework to facilitate a safe and robust children's programming environment must be set in place as the digital age begins, it is important to recognize that there is much yet to be learned as the digital age develops. Therefore, Children Now encourages the Commission to adopt the foregoing proposals, but to continue to revisit the issues addressed herein as the digital age develops. It would perhaps be advantageous, for example, to open a new inquiry within a year or two after digital television begins significantly to penetrate the market, and to determine at that time whether further rulemaking is necessary.

It is Children Now's hope, in short, that the instant rulemaking will mark not the end but rather the beginning of a dynamic partnership between public and private sectors, motivated by the common purpose of ensuring the realization of digital television's promise for all American children. Thus, while Children Now believes that its proposals provide the materials for a healthy and robust beginning for children's programming in

is true both with respect to inappropriate *advertisement* content, as well as to the marketing of age-inappropriate *products*.